

Aparicio v 41-32 40th St.
2020 NY Slip Op 34429(U)
December 10, 2020
Supreme Court, Queens County
Docket Number: 705996/20
Judge: Timothy J. Dufficy
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Short Form Order

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12/11/2020
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COUNTY CLERK
QUEENS COUNTY

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
WALTER APARICIO,

Plaintiff,

Index No.: 705996/20

Mot. Date: 11/24/20

-against-

Mot. Seq. No. 1 and 2

41-32 40TH STREET, SUNNYSIDE LLC and
DOGAN KIMILLI,

Defendants.

-----X
The following papers were read on this motion by plaintiff for a default judgment against defendant 41-32 40th Street, Sunnyside LLC, pursuant to CPLR 3215; on the motion by plaintiff for various types of injunctive relief; and on the cross-motion by defendants for an order: dismissing the Amended Complaint, pursuant to CPLR 3211(a)(1) and (a)(7) against defendants; pursuant to CPLR 2201, 2004 and 5015(a), extending defendants' time to respond to the Amended Complaint to the date of filing of the instant cross-motion to dismiss and thus, deeming the cross-motion as timely; and, pursuant to 22 NYCRR 130-1.1, imposing sanctions as against plaintiff.

PAPERS
NUMBERED

Mot. Seq. 1

Order to Show Cause.....	EF 22
Affidavits-Exhibits	EF 9-18
Affidavits of Service.....	EF 27-28
Memorandum of Law in Support.....	EF 19
Memorandum of Law in Opposition.....	EF 55
Affidavits in Opp to Cross-Mot.....	EF 77
Memorandum of Law in Opp to Cross-Mot.....	EF 78

Mot. Seq. 2

Notice of Motion-Affidavits-Exhibits	EF 40-53
Answering Affidavits.....	EF 75-76
Replying Affidavits-Exhibits.....	EF 79-81

As an initial matter, the motion with cross-motion as, marked as Motion Sequence No. 1 and the motion, marked as Motion Sequence No. 2, are joined solely for purposes of disposition.

Upon the foregoing papers, it is ordered that: plaintiff’s motion for a default judgment is denied; plaintiff’s motion for: an order, pursuant to CPLR 6301, enjoining the defendants from conducting any further construction work on plaintiff’s property, located at 41-34 40th Street, Sunnyside, NY 11104, pending the issuance of an order by this Court; for an order, pursuant to NY RPAPL 871, directing the defendants to remove any fencing or other encroachments to the extent that they encroach on the plaintiff’s property, or in the alternative, awarding the plaintiffs’ damages to be determined at the trial in lieu of an injunction; and for an order enjoining the defendants, their agents and contractors from trespassing on the plaintiff’s property, except to the extent necessary to remove the part or whole of the fencing and other encroachments currently encroaching on the plaintiff’s property, if granted by this court, and awarding the plaintiffs preliminary pecuniary civil penalties or sanctions against the defendants for their deliberate trespass, is granted in part and denied in part; and defendants’ cross-motion is granted in part and denied in part.

The underlying action is one brought by plaintiff Walter Aparicio, sounding in trespass, nuisance, and encroachment and seeking declaratory relief, injunctive relief, and damages against defendants 41-32 40th Street, Sunnyside LLC and Dogan Kimilli. The record reflects that plaintiff and defendants are respective owners of adjacent parcels of property located at 41-34 40th Street, Sunnyside, NY 11104 and 41-32 40th Street, Sunnyside, NY 11104.

Plaintiff’s motion for a default judgment as against defendant, 41-32 40th Street, Sunnyside, LLC, pursuant to CPLR 3215, is denied, and that branch of defendants’ cross-

motion for an order, pursuant to CPLR 2201, 2004 and 5015(a), extending the defendants' time to respond to the Amended Complaint, is granted.

Plaintiff maintains that he served defendant 41-32 40th Street, Sunnyside LLC with a Summons with Notice, through the Secretary of State, on June 1, 2020, and, thereafter, filed a Complaint and Amended Complaint also in June, 2020. Defendant 41-32 40th Street, Sunnyside LLC admits that it was properly served but contends that it served a Motion to Dismiss, pursuant to CPLR 3211(a), in October, 2020, in lieu of serving an Answer, which motion shall be deemed timely.

Pursuant to CPLR 2004, courts can extend the time imposed by statute upon good cause shown. Pursuant to CPLR 3012(d), "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default."

It is well-established law that: "[a] defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when . . . moving . . . to compel the acceptance of an untimely answer." (*Lipp v Port Authority of New York and New Jersey*, 34 AD3d 649 [2d Dept 2006]). The record reflects that the delay was minimal. The Court finds that there is no evidence of prejudice and that cross-moving defendant 41-32 40th Street, Sunnyside LLC has provided a reasonable excuse for the delay in that: *inter alia*, the applicable statute of limitations time periods were tolled by the Executive Orders of the Governor of the State of New York, Andrew Cuomo, including, but not limited to, Executive Order 202.67; Mr. Kimilli, the sole owner of corporate defendant 41-32 40th Street, Sunnyside LLC, was unaware that a corporation needed to be represented by an attorney, and delays ensued in finding a proper attorney due to the Covid-19 pandemic. Additionally, the cross-moving defendant has presented a meritorious defense to the action via its cross-motion to dismiss, dated October 8, 2020 (NYSCEF DOC. NO. 57) and filed on October 9, 2020, as well as via the Affidavit of defendant, Dogan Kimilli, sole owner of corporate defendant 41-32 40th Street, Sunnyside LLC.

The Appellate Division, Second Department, has held that where there is a lack of prejudice to the plaintiff, a meritorious defense, and a 2½ month delay in serving the

answer, in light of the public policy of resolving cases on the merits, such a delay in serving the answer should be overlooked (*Kaiser v Delaney*, 255 AD2d 362 [2d Dept 1998]). The instant Court notes that the defendants's default in serving an Answer was relatively brief (*See Mulder v Rockland Armor & Metal Corp.*, 140 AD2d 315 [2d Dept 1988], stating "[i]n view of the relatively short period of the delay, the absence of any claim of prejudice to the plaintiff, the existence of a possible meritorious defense, the absence of any willfulness on the appellants' part and the public policy in favor of resolving cases on the merits, the Supreme Court should have . . . granted the appellants leave to file late answers."

As such, defendants' motion to dismiss, dated October 8, 2020, is deemed timely, and that branch of defendants' cross-motion for an order, pursuant to CPLR 2201, 2004 and 5015(a), extending defendants' time to respond to the Amended Complaint, is granted.

However, upon reviewing defendants' motion to dismiss, dated October 8, 2020, that branch of defendants' application for dismissal, under CPLR 3211(a)(1) and (7), is denied.

Relief cannot be granted pursuant to CPLR 3211(a)(1). CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v Midtown Development, L.P.*, 32 AD3d 294 [1st Dept 2006] [internal citations omitted]). "To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds,

contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (*Fontanetta v John Doe 1*, 73 AD3d at 84–85 [internal quotation marks omitted]). It is well-established law that affidavits and deposition testimony are not documentary evidence, and deeds and contracts are documentary evidence (*Id.*) “[T]o be considered ‘documentary’, evidence must be unambiguous and of undisputed authenticity” (*Id.*)(*internal citations omitted*).

The documentary evidence submitted in the instant matter is insufficient to dispose of the Amended Complaint. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v Kaufman* 91 NY2d 425 [1998]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Here, the defendants submits, *inter alia*, a property survey and deeds. Such are insufficient to dispose of the cause of action, as factual issues remain. As such, relief cannot be granted pursuant to CPLR 3211(a)(1).

Additionally, relief cannot be granted, pursuant to CPLR 3211(a)(7). "It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999]; *Leon v Martinez*, 84 NY2d 83 [NY 1994]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see, Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc., supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see, Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633[NY 1976]). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (*see Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159).

The Court finds that the Amended Complaint adequately states causes of action as against defendants. As such, relief cannot be granted pursuant to CPLR 3211(a)(7).

Furthermore, the defendants have improperly sought to reach the merits of the complaint on this mere CPLR 3211(a) motion (*see Stukuls v State of New York, supra*; *Jacobs v Macy's East Inc., supra*).

Defendant 41-32 40th Street, Sunnyside LLC shall serve and file an Answer, within thirty (30) days of the date that this Order appears in the minutes of the Office of the Queens County Clerk–NYSCEF system.

Defendants are free to make a CPLR 3212 motion for summary judgment once an Answer has been served and filed.

Next, turning to that branch of defendants' cross-motion for an order seeking sanctions in connection with this action based on plaintiff's frivolous conduct, under 22 NYCRR 130-1.1, said branch is denied. Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution fo the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." At this stage, the court finds that the moving defendant has not demonstrated that plaintiff's conduct is "frivolous" as defined by 22 NYCRR 130-1.1. (*See, Schaeffer v Schaeffer*, 294 AD2d 420 [2d Dept 2002]; *Breslaw v Breslaw*, 209 AD2d 662, 663 [2d Dept 1994]). The conduct of the plaintiff has not risen to the level of frivolous.

Finally, turning to plaintiff's motion seeking various forms of injunctive relief, said is determined as follows:

That branch of plaintiff's motion for an order pursuant to CPLR 6301 enjoining defendants from conducting any further construction work on plaintiff's property located at 41-34 40th Street, Sunnyside, NY 11104, pending the issuance of an order by this Court is granted in part and denied in part. Defendant's may continue further construction work only to the extent that such work does not encroach or trespass upon plaintiff's property located at 41-34 40th Street, Sunnyside, NY.

That branch of plaintiff's motion for an order, pursuant to NY RPAPL 871, directing the defendants to remove any fencing or other encroachments to the extent that

they encroach on the plaintiff's property, or in the alternative, awarding the plaintiffs' damages to be determined at the trial in lieu of an injunction, is denied. Defendants shall not be directed to remove any fencing or other encroachments to the extent that they encroach on the plaintiff's property, unless and until further order of this Court is issued.

That branch of plaintiff's motion for an order enjoining the defendants, their agents and contractors from trespassing on the plaintiff's property except to the extent necessary to remove the part or whole of the fencing and other encroachments currently encroaching on the plaintiff's property, if granted by this court and awarding the plaintiffs preliminary pecuniary civil penalties or sanctions against the defendants for their deliberate trespass, is denied. Defendants shall continue construction at this time, solely to the extent that said construction does not interfere with the plaintiff's use, occupancy, and quiet enjoyment of his property, located at 41-34 40th Street, Sunnyside, NY 11104.

In sum, plaintiff's application for a preliminary injunction is denied at this time, pending further order of this Court and pending submission to the NYSCEF system of a new survey and an expert affidavit by a surveyor of defendants' choosing, within sixty (60) days of the date that this Order appears in the minutes of the Queens County Clerk-NYSCEF system.

The matter shall be scheduled for a hearing to be conducted virtually, on **Tuesday, April 20, 2021, at 10:30 a.m., via Microsoft TEAMS.**

Accordingly, it is

ORDERED that the plaintiff's motion for a default judgment is denied; and it is further

ORDERED, that the branch of defendants' cross-motion for an order, pursuant to CPLR 2201, 2004 and 5015(a), extending the defendants' time to respond to the Amended Complaint to the date of filing of the instant cross-motion to dismiss, and, thus, deeming the cross-motion as timely, is granted; and it is further

ORDERED, that the branch of defendants' cross-motion for an order dismissing the Amended Complaint in its entirety, pursuant to CPLR 3211(a)(1) and (a)(7), is denied; and it is further

ORDERED that defendant 41-32 40th Street, Sunnyside LLC shall serve and file an Answer, within thirty (30) days of the date of the date that this Order appears in the minutes of the Office of the Queens County Clerk–NYSCEF system; and it is further

ORDERED, that the branch of defendants' cross-motion seeking sanctions is denied; and it is further

ORDERED that that branch of plaintiff's motion for an order, pursuant to CPLR 6301, enjoining the defendants from conducting any further construction work on plaintiff's property, located at 41-34 40th Street, Sunnyside, NY 11104, pending the issuance of an order by this Court, is granted in part and denied in part, in that the defendants may continue further construction work **only to the extent** that such work does not encroach or trespass upon the plaintiff's property, located at 41-34 40th Street, Sunnyside, NY; and it is further

ORDERED that that branch of plaintiff's motion for an order, pursuant to NY RPAPL 871, directing the defendants to remove any fencing or other encroachments to the extent that they encroach on the plaintiff's property, or in the alternative, awarding the plaintiffs' damages to be determined at the trial in lieu of an injunction, is denied.

Defendants **shall not** be directed to remove any fencing or other encroachments to the extent that they encroach on the plaintiff's property, unless and until further order of this Court is issued; and it is further

ORDERED that that branch of plaintiff's motion for an order enjoining the defendants, their agents and contractors from trespassing on the plaintiff's property, except to the extent necessary to remove the part or whole of the fencing and other encroachments currently encroaching on the plaintiff's property, if granted by this court

and awarding the plaintiffs preliminary pecuniary civil penalties or sanctions against the defendants for their deliberate trespass, is denied.

Defendants shall continue construction at this time, solely to the extent that such construction does not interfere with plaintiff's use, occupancy, and quiet enjoyment of his property located at 41-34 40th Street, Sunnyside, NY 11104; and it is further

ORDERED that plaintiff's application for a preliminary injunction is denied, at this time, pending further order of this Court, and pending submission to the NYSCEF system of a new survey and an expert affidavit by a surveyor of defendants' choosing, within sixty (60) days of the date that this Order appears in the minutes of the Queens County Clerk-NYSCEF system; and it is further

ORDERED that the matter shall be scheduled for a hearing to be conducted virtually on **Tuesday, April 20, 2021 at 10:30 a.m., via Microsoft TEAMS.**

The foregoing constitutes the decision and order of this Court.

Dated: December 10, 2020



TIMOTHY J. DUFFICY, J.S.C.

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