At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 27th day of January, 2019.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

To commence the statutory time for appeals of right (CPLR 5513[a], you are advised to serve a copy of this order, with notice of entry, on all parties.

IRENE KLOSTERMEIER,

PLAINTIFF,

-AGAINST-

CITY OF PORT JERVIS

DEFENDANT.

DECISION & ORDER
INDEX #EF009503/2019
Motion date: 01/15/2020
Motion Seq.# 1, 2 & 3

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 to 18 were read on plaintiffs' application for a preliminary injunction (Seq.#1), defendant's motion to dismiss the complaint (Seq. #2) and plaintiff's cross-motion to dismiss defendant's affirmative defenses (Seq. #3):

PAPERS	NUMBERED
Motion Seq. #1:	
Order to Show Cause/Affirmation (Feerick) Exhibit A Supporting Affidavit (Klostermeier) Exhibits A-I/ Engineer Affidavit (Fuller)/ Memorandum of Law	1 - 7
Motion Seq. #2:	
Notice of Motion/Affirmation (Varga) Exhibits 1-4	8 - 10
Reply Affirmation (Feerick)	11
Reply Affidavit (Klostermeier) Exhibit A-D	12 - 13
Motion Seq. #3:	
Notice of Cross-Motion/ Affirmation (Feerick) Exhibits A - B Affidavit (Cox)/ Exhibit A	14 - 18

Plaintiff commenced this action on December 3, 2019 alleging that she is experiencing settling of her property due to discharge of surface water run-off onto her property as a result of defendant's draining system work performed in May 2015. The work consisted of relocating a catch basin and replacing a large underground drainage pipe between plaintiff's property and the neighboring property.

The First Cause of Action charges defendant with trespass based on the lack of any agreement authorizing defendant to use or occupy plaintiff's property for any purpose, including the continued surface water run-off onto plaintiff's property.

The Second Cause of Action charges defendant with private nuisance based on defendant's continuing failure to abate the problem which adversely affects plaintiff's property.

The Third Cause of Action charges defendant with intentional infliction of emotional distress alleging defendant has engaged in extreme and outrageous conduct intending to cause severe emotional distress to plaintiff.

The Fourth Cause of Action seeks a permanent injunction enjoining defendant from surface water run-off onto plaintiff's property.

The Fifth Cause of Action charges defendant with inverse condemnation based on City's failure to compensate plaintiff for the their use of the property and for the surface water run-off.

Plaintiff makes clear that she is not alleging "a negligence cause of action based on faulty installation, design, etc. of the pipe, its operation or functioning or anything else" (*See*, Feerick Aff Opp ¶20).

By Order to Show Cause, plaintiff moves for a preliminary injunction enjoining the City, during the pendency of the action, from allowing any surface water to run-off onto plaintiff's property (Mot Seq.#1 and Seq. #2 dismissing the Fourth Cause of Action).

To prevail upon a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) the likelihood of success on the merits of the action, (2) that it will suffer irreparable injury absent the issuance of a preliminary injunction, and (3) that the balance of equities is in its favor (*see* CPLR 6301; *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862 [1990]; *Winchester Global Trust Co. Ltd. v. Donovan*, 58 A.D.3d 833, 834 [2d Dept 2009]; *Winzelberg v. 1319 50th Realty Corp.*, 52 A.D.3d 700, 702 [2d Dept 2008]; *Coinmach Corp. v. Alley Pond Owners Corp.*, 25 A.D.3d 642, 643 [2d Dept 2006]). The existence of an issue of fact "shall not in itself be grounds for denial of the motion" (CPLR 6312[c]; see *Stockley v. Gorelik*, 24 A.D.3d 535 [2d Dept 2005]). "[T]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction" (*Egan v. New York Care Plus Ins. Co.*, 266 A.D.2d 600, 601 [3d Dept 1999]). The purpose of a preliminary injunction is to maintain the status quo pending determination of the action (*see Ruiz v. Meloney*, 26 A.D.3d 485, 486 [2d Dept 2006]; *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604, 605 [2d Dept 2005]). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court (*see Doe v. Axelrod*, 73 N.Y.2d 748, 750 [1988]; *Ruiz v. Meloney*, 26 A.D.3d at 486; *Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d at 605).

Plaintiff has failed to demonstrate a clear right to relief under this standard (*Evans-Freke v Showcase Contracting Corp.*, 3 AD3d 549 [2nd Dept 2004]). Plaintiff has not alleged that the damage occurred due to the bad faith of the City. Further, plaintiff has failed to establish by clear and convincing evidence that she will suffer irreparable harm absent an injunction.

In support of her application, plaintiff submits the Affidavit of John Fuller, P.E., a certified civil and structural engineer. His opinion is based upon his limited visual observations

of the property in 2012, 2015 and 2019. Mr. Fuller did not have any prior records or photographs concerning his prior observations.

He indicates that he first visited the property in 2012 as he was hired to provide plans for the repair of plaintiff's porch and a new deck. At that time, Mr. Fuller remembers that the garage and driveway were in good condition. The next time he observed the property was in September 2015, four months after the City performed the drainage work at the property. At that time Mr. Fuller observed some minor cracks in the driveway pavement and stone wall, cracking in the garage exterior walls and floor and a depression in the pavement which he states caused a gap between the bottom of the garage door and its floor. It was plaintiff's belief that the damage was caused by the heavy equipment the City used to perform the drainage work four months earlier. In his affidavit, Mr. Fuller does not state his opinion regarding his observations in 2015.

The next time Mr. Fuller observed the property was four years later in 2019. He states that he found substantial cracking of the pavement in the road and along the driveway. It was from this cursory observation Mr. Fuller opines that on-going water intrusion and not the heavy equipment is the cause of the worsening damage. He states that he observed the photographs that are annexed to plaintiff's affidavit and that they are an accurate depiction of the property conditions he observed in 2019. It should be noted that some pictures show a garage and some show a standard door. Plaintiff indicates that she had the garage door removed and replaced with a standard door in 2016. Plaintiff does not provide the Court with the dates such pictures were taken or who took them.

Further, although Mr. Fuller opines that the condition continues to get worse, he makes no indication of what will happen if an injunction is not granted. Such a conclusory and unsubstantiated opinion is insufficient to demonstrate clear and convincing evidence that

plaintiff will suffer irreparable injury or that the balance of equities is in her favor. Plaintiff has not established her entitlement to a preliminary injunction pending a determination of the underlying action.

Defendant's Motion to Dismiss:

Defendant moves to dismiss the complaint for, *inter alia,* failure to state a cause of action. In assessing a motion to dismiss a cause of action pursuant to CPLR §3211(a)(7), where evidentiary material is adduced in support of the motion, 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 N.Y.2d 268, 275 [1977]; *Steiner v. Lazzaro & Gregory*, 271 A.D.2d 596 [2d Dept 2000]; *Meyer v. Guinta*, 262 A.D.2d 463, 464 [2d Dept 1999]). "[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion" (*Palazzolo v. Herrick, Feinstein, LLP*, 298 A.D.2d 372 [2d Dept 2002]).

Plaintiff, who is understandably alarmed by the situation, offers no evidence that the City's replacement of the pipe or relocation of the storm drain increased either the volume, or the velocity of storm waters being discharged onto her property. Rather than competent evidence, plaintiff offers only speculation to support her theories of liability. Her expert's affidavit omits any explanation as to how the City's work in 2015 has affected the volume or velocity of the natural flow of the water. Given that liability is premised on an artificially imposed increased flow of surface water the lack of competent proof that any flooding of the property "was caused by the construction of artificial channels rather than by unprecedentedly heavy rains" (*Cashin v. City of New Rochelle*, 256 N.Y. 190, 194 [1931]) is fatal to their trespass and nuisance causes of action.

Concerning the trespass occasioned by the City's equipment intruding upon plaintiff's driveway during the work performed in 2015, such claim is time barred as it is beyond the three year statute of limitations.

There is also no basis for plaintiff's inverse condemnation cause of action, as she has failed to allege that the City has intruded onto the her property and "interfered with [her] property rights to such a degree that the conduct amounts to a constitutional taking requiring the government to purchase the property from [her]" (*Village of Tarrytown v. Woodland Lake Estates*, 97 A.D.2d 338, 343 [2d Dept 1983] [internal quotation marks and citations omitted]). Neither plaintiff's allegations, which claim intermittent flooding associated with rain events, nor her evidence, which does not support a finding that the City purposefully diverted water onto the property, that would otherwise have traveled in a different direction, provide a basis for requiring the City to purchase the property (*Id.*).

Defendant also moves to dismiss the plaintiff's third cause of action pursuant to CPLR 3211(a)(7). To state a cause of action to recover damages for the intentional infliction of emotion distress, the conduct alleged must be so outrageous in character and extreme in degree as to surpass the limits of decency so "as to be regarded as atrocious and intolerable in a civilized society" (*Long Island Care Center, Inc. v Goodman*, 137 AD3d 874 [2d Dept 2016] *quoting Freihofer v Hearst Corp.*, 65 NY2d 135 [1985]). Here, the conduct alleged, even if proven, does not rise to that level (*see Raymond v Marchand*, 125 AD3d 835, 836 [2d Dept 2015]).

Accordingly, it is hereby

ORDERED that plaintiff's application for a preliminary injunction (Mot. Seq.#1) is denied, and it is further

ORDERED that defendant's motion to dismiss the complaint (Mot. Seq. #2) is granted; and it is further

ORDERED that plaintiff's cross-motion (Mot. Seq.#3) is denied as moot.

ENTER

Dated: January 27, 2020
Goshen, New York

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of Record via NYSCEF