

<b>Jemsco Realty LLC v N47 Assoc. LLC</b>
2021 NY Slip Op 32366(U)
November 19, 2021
Supreme Court, New York County
Docket Number: Index No. 190819/2020
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD PART 35

*Justice*

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JEMSCO REALTY LLC

Petitioner,

- v -

N47 ASSOCIATES LLC,

Respondent.

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INDEX NO. 190819/2020

MOTION DATE 02/16/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing documents, it is

ORDERED that the motion of respondent/plaintiff Jemsco Realty LLC (Jemsco) (motion sequence number 001 of Index No. 190819/2020), pursuant to CPLR 3212, for summary judgment on its claims of adverse possession and prescriptive easement as against petitioner/defendant N47 Associates, LLC (N47) is denied with leave to replead; and it is further

ORDERED that N47's cross motion for summary judgment dismissing the adverse possession, prescriptive easement and trespass claims against it is granted, as limited above, to the extent that the trespass claim and those adverse possession claims predicated on encroachments of the Aerial Elements over the air space of the Strip are dismissed; and the cross motion is otherwise denied with leave to replead; and it is further

ORDERED that the adverse possession claims raised by Jemsco in opposition to the Special Proceeding (Index No. 159215/2020) are decided in accordance with the findings in this Decision and Order; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Jemsco shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days; and it is further

ORDERED that the parties shall appear for a Microsoft Teams Conference on January 13, 2021 at 10:00am.

### **MEMORANDUM DECISION**

Motion sequence number 001 of index no. 159215/2020 and motion sequence number 001 of index no. 190819/2020 are hereby consolidated for disposition.

Index no. 159215/2020 is a special proceeding (the Special Proceeding). Commenced by order to show cause, petitioner/defendant N47 Associates, LLC (N47) seeks an order, pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881, granting N47 a license to access real property owned by respondent/plaintiff Jemsco Realty LLC (Jemsco), which is located at 29 West 47<sup>th</sup> Street, New York, New York (the Jemsco Property).<sup>1</sup>

Index no. 190819/2020, commenced by respondent/plaintiff Jemsco, is an action to quiet title and resolve an adverse possession dispute regarding a 100-foot by 18-inch strip of land (the Strip) located at 27 West 47th Street (the Adverse Possession Action). The disputed Strip, as recorded, sits on property owned by N47 (the N47 Property), and is directly adjacent to the Jemsco Property.

By so ordered stipulation, dated December 15, 2020, the Special Proceeding and the Adverse Possession Action were consolidated (Special Proceeding, NYSCEF Doc. No. 61).

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<sup>1</sup> The access was sought, inter alia, for the purpose of shoring up the Jemsco Property in relation to construction work to be performed on N47's property, which entails the demolition of a then existent (now demolished) building and the construction of a new building.

The issues with respect to N47's access to the Jemsco Property have been addressed by the court via ongoing conferencing and interim orders (Special Proceeding, NYCEF Doc. Nos. 64 and 75). It is noted that, in its opposition to the Special Proceeding, Jemsco raised a claim of adverse possession over the Strip. Those arguments mirror those arguments raised by Jemsco in the Adverse Possession Action. Therefore, to the extent that issues dependent upon a determination of adverse possession reside within the Special Proceeding, such issues will be addressed by this decision and order.

To wit, in motion sequence number 001 of the Adverse Possession Action, Jemsco moves, pursuant to CPLR 3212, for summary judgment in its favor on the first four counts of its complaint, sounding in (1) adverse possession, (2) prescriptive easement and (3 & 4) a declaration of ownership or easement over the Strip.

N47 cross moves, pursuant to CPLR 3212 and 3211 (a) (7), for summary judgment dismissing the complaint.<sup>2</sup>

### **BACKGROUND**

Jemsco purchased the Jemsco Property on July 31, 2007 (complaint, ¶ 3; NYSCEF Doc. No. 19). N47 purchased the N47 Property on October 26, 2018 (*id.*, ¶ 5). The Jemsco Property's east side abuts the N47 Property's west side (the Property Line).

The Jemsco Property was (and remains) improved by a 16-story commercial building that was built in the 1930s (the Jemsco Building). The N47 Property was improved by a 6-story commercial building that predated the Jemsco Building (the N47 Building). The N47 Building was demolished in 2020.

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<sup>2</sup> The note of issue has yet to be filed in this action, and no discovery appears to have taken place.

When the N47 Building was originally built (in approximately 1924), its west facing outer wall was located 18 inches short from its side of the Property Line. The Jemsco Building's east facing outer wall was built flush with the Property Line. This 18-inch gap comprises the Strip at issue herein.

Now, Jemsco seeks a determination that it has adversely possessed the Strip, based on six factors, each of which exist within the Strip, namely: (1) a brick extension/infill wall on the northern end of the Strip (the Extension Wall); (2) a cinder block protrusion connected to the Jemsco Building, extending into the Strip towards its southern end, (3) a series of wooden spars and iron grates affixed to the sixth floor of the Jemsco Building that hung over the Strip; (4) a concrete window ledge extending into the Strip from an elevation; (5) air conditioners from windows that extend past the Property Line and protrude into the Strip and (6) a 9-inch protrusion of the Jemsco Building's foundation into the Strip (collectively, the Objects).

**Affidavit of Jack Elo (Jemsco's Managing Member)**

According to Jack Elo, the managing member of Jemsco, at some point prior to Jemsco's purchase of the Jemsco Property, a prior owner of the Jemsco Property built the Extension Wall across the north side of the Strip. This wall connected the Jemsco Building and the N47 Building and closed off the north side of the Strip (Elo affidavit, ¶ 5; NYSCEF Doc. No. 8).

Also, according to Elo, the southern side of the Strip contained "cinder block protrusion" attached to the Jemsco Building, that extended 16 inches into the Strip, "substantially enclosing" its southern side (*id.*). In addition, "wooden spars affixed to the Jemsco Building's east wall and extending about [16] inches into the Strip," with "iron grates" affixed thereto, enclosed most of the top of the Strip (*id.*). Elo also stated that part of the Jemsco Building's foundation extends nine inches into the Strip. Next, Elo noted that the sixth floor of the Jemsco Building includes a

long window ledge that extends approximately six inches into the Strip. Finally, Elo stated that many of the Jemsco Building's east facing windows have air conditioners that extend up to 22 inches into the Strip (and, therefore, over the former N47 Building itself) (*id.*).

According to Elo, each of these intrusions into the Strip were in existence when Jemsco purchased the Premises, and most were in plain sight (*id.* at 11). Because of this, Elo "believed" that Jemsco possessed the Strip (*id.* at 12).

### ***Affidavit of David Rothstein (N47's Vice President)***

David Rothstein states that he is the vice president of N47. N47 is the fee owner of the N47 Property, which includes the Strip. N47 intends to build a 31-story building on its property, utilizing the entirety of the Strip. This would necessitate the removal of the Extension Wall, the cinderblock protrusions, and all overhangs from the Strip (Rothstein affidavit, at 7; NYSCEF Doc. No. 23).

### ***Expert Affidavits and Surveys***

#### ***Affidavit of Donal O'Buckley (Jemsco's Site Surveyor)***

Donal O'Buckley states that he is a licensed surveyor. He was retained by Jemsco to survey the N47 Property, specifically the Property Line. As part of his survey, he made a visual inspection of the N47 Property and reviewed a 1946 survey of the same. Based on his review of the 1946 survey, O'Buckley opines that the "entire eastern foundation [of the Jemsco Building] protrudes approximately nine inches over the property line" (O'Buckley tr, ¶ 3; NYSCEF Doc. No. 14). In further support of the survey, O'Buckley relies on a photograph that depicts the eastern wall of the Jemsco Property.<sup>3</sup>

#### ***The 1946 Survey***

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<sup>3</sup> O'Buckley does not describe the photograph or indicate what specifically supports his opinion.

The 1946 survey is annexed to O'Buckley's affidavit (O'Buckley affidavit, exhibit B; NYSCEF Doc. No. 16). As relevant, it states the following:

“Division line between foundation walls of building on East and of building on West and East Face of Brick wall of building on west immediately above foundation wall all as located and shown on survey dated September 27, 1930 is [nine inches] east of reference line. This condition probably exists at the present time, but due to the fact that the outer faces are inaccessible it is impossible to verify this construction”

(*id.*).

*Affidavit of Patrick Jones (N47's Site Surveyor)*

Patrick Jones states that he is a licensed surveyor and the president of New York City Land Surveyors, P.C. (NYCLS). NYCLS was retained by N47 to perform a site survey of the N47 Property, and the plots adjacent thereto. He prepared a survey of the N47 Property (the NYCLS survey) (Jones affidavit, exhibit A; NYSCEF Doc. No. 26). Finally, he also reviewed the 1946 survey.

Jones opines that the 1946 survey is insufficient to establish the existence of a 9-inch encroachment into the Strip, because the 1946 survey was unable to confirm the 1930 survey's findings (Jones affidavit, ¶ 9; NYSCEF Doc. No. 25). Jones further opines that, based on both the 1946 survey and his own NYCLS survey, the Strip lies on N47's property (Jones affidavit, ¶ 16).

Jones also describes the photograph relied upon by O'Buckley, noting that it depicts “the remnants of the foundation wall from the [N47 Building]” (*id.*, ¶ 16). According to Jones, this information is reflected in the NYCLS survey (*id.*).

*Affidavit of James Michael Patterson, P.E. (N47's Engineering Expert)*

James Michael Patterson states that he is a licensed professional civil engineer. He is also a principal of Ancora Engineering, PLLC. Ancora was retained by N47 in relation to the demolition of the N47 Building. Patterson states that he was the engineer responsible for said demolition.

Patterson reviewed the 1946 survey relied upon by O'Buckley. Patterson concurs with Jones that the 1946 survey is not based on a visual inspection of the purported encroachment. Patterson also reviewed the photograph relied upon by O'Buckley. He notes that the photograph depicts the wall of the Jemsco Building but does not indicate where the Property Line is. He also notes that it depicts a "protrusion from the ground" that "runs adjacent to the eastern wall of the Jemsco Building and along the western edge of N47's Property" (Patterson affidavit, ¶ 12). Patterson states that this protrusion is shown on the NYCLS survey.

Patterson also notes that, based on his work on the N47 Premises and with the demolition of the N47 Building, the photograph relied upon by O'Buckley (annexed to O'Buckley affidavit, exhibit C) depicts, not a protruding portion of the foundation wall of the Jemsco Building, but "the remnants of the foundation wall of the [demolished N47 Building]" (Patterson affidavit, ¶ 15).

Further, Patterson opines that "it is not possible . . . to conclude that the Jemsco foundation wall encroaches 9" based on the current available information" (Patterson affidavit, ¶ 8), because the 1946 survey is not based on an actual observation of the alleged foundation intrusion.

*O'Buckley Reply Affidavit*

O'Buckley reiterates that the 1946 survey indicates that the foundation of the Jemsco Building protruded nine inches into the Strip. He further opines that it is at least possible that the



foundation wall was partially above ground and, therefore, openly visible. Finally, O'Buckley states that his attempts to view the foundation wall were rebuffed by N47, as the foundation wall was covered with rubble. This rubble prevented him from measuring to the base of the Jemsco Building, and also obscured the view of the foundation.

Jones Sur-Reply Affidavit

Jones states that there is no evidence in the 1946 survey that the alleged foundation protrusion was above ground. Further, he states that during his survey of the N47 Property, he did not observe any “visible foundation encroachment” from the Jemsco Building into the Strip (Jones sur-reply affidavit, ¶ 7; NYSCEF Doc. No. 45).

Patterson Sur-Reply Affidavit

In response to Jack Elo’s statement that a filler wall within the Strip extended from the ground to the sixth floor (Elo reply affidavit, ¶ 2; NYSCEF Doc. No. 33), Patterson states that this structure did not reach the ground, but “started from the 2d floor . . . [and] cantilever[ed] out over the airspace of N47’s Property” (Patterson sur-reply affidavit, ¶ 9; NYSCEF Doc. No. 46). Patterson also disputes Elo’s description of certain photographs, insisting that they depict an entirely different section of the Premises.

Finally, Patterson states that the Jemsco Building’s eastern wall is terra cotta and that such walls “are supported vertically, and not laterally” and, therefore, that any lateral protrusions into the strip could not be structural (*id.*, ¶ 23).

**DISCUSSION**

“[T]he proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). “Failure to make such prima facie showing

requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1<sup>st</sup> Dept 1993]). Finally, evidence must be “construed in the light most favorable to the one moved against” (*Kershaw*, 114 AD3d at 82). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

#### **Jemsco’s Motion For Adverse Possession**

Jemsco argues that it is entitled to a declaration that it is the rightful possessor of the Strip based on “at least” 10 years of open, notorious, actual, and hostile occupancy of the Strip. N47 argues that Jemsco has failed to establish, by clear and convincing evidence, that Jemsco’s alleged occupation of the Strip can constitute adverse possession.

Traditionally, “[t]o establish a claim of adverse possession, the following five elements must be proved: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period” (*Walling v Przybylo*, 7 NY3d 228, 232 [2006]). Importantly, each element must be “proven by clear and convincing evidence” (*id.*).

Further, under this analysis, where an adverse possession claim is not based on a written instrument – as is the case here – a party claiming adverse possession must further demonstrate “that the disputed area was either usually cultivated or improved or protected by a substantial

enclosure” (*Houdek Real Estate Co., LLC v Bayport Postal Realty, LLC*, 180 AD3d 761, 762 [2d Dept 2020] [internal quotation marks and citations omitted]).

However, in 2008, the legislature modified what constitutes adverse possession under the RPAPL. After enactment, rather than needing to show that an area was “usually cultivated or improved or protected by a substantial enclosure” (*id.*), a claimant would need to demonstrate “acts sufficiently open to put a reasonably diligent owner on notice” (RPAPL § 522 [1]) or establish that the property “has been protected by a substantial enclosure, except as provided in [RPAPL § 543]” (*id.*, § 522 [2]). RPAPL § 543 provides the following:

“Notwithstanding any other provision of this article, the existence of de minimus non-structural encroachments including, but not limited to, fences, hedges, shrubbery, plantings, sheds and non-structural walls, shall be deemed to be permissive and non-adverse”

(RPAPL § 543[1]).

Importantly, this new statutory scheme is only applied in instances where the purported adverse possession claim ripened after the 2008 statutory scheme’s effective date (*Hogan v Kelly*, 86 AD3d 590, 592 [2d Dept 2011] [“[T]he version of the law in effect at the time the purported adverse possession allegation ripened into title is the law applicable to the claim”]).

### ***The Order of Arguments***

Before addressing the specifics raised by the parties, it is important to set forth the order of the arguments put forward by the parties in their motions.

Jemscos purchased the Jemscos Property on July 31, 2007. It alleged in the complaint that its adverse possession claim ripened into title “since at least July 31, 2017” (complaint, ¶ 22). In its’ motion, Jemscos argues that it, along with its’ predecessors in title, entered into the Strip via the Objects. It argues that it has held actual possession of the Strip openly, exclusively and

continuously, since 2007 due to the existence of the Objects in the Strip. It also argues that this use should be presumed hostile (*Ducasse v D'Alonzo*, 100 AD3d 953, 954 [2d Dept 2012] [“where the plaintiff demonstrates, by clear and convincing evidence, the open and notorious and undisputed use of the subject property, it is presumed that the use was adverse”]).

In its cross-motion, N47 generally argues that Jemsco has failed to establish entitlement to judgment in its favor because it failed to present clear and convincing evidence to support its claim. Specifically, it argues four points. (1) Jemsco failed to establish that it cultivated, improved or enclosed the Strip (former RPAPL § 522); (2) adverse possession cannot be established by any protrusion into the air above N47’s property; (3) the existence of an underground foundation wall cannot be open and notorious; (4) Jemsco cannot establish a claim of right or hostility under the 2008 formulation of the RPAPL.

In reply and opposition to the cross-motion, Jemsco argues that it should be allowed to tack any adverse possession time from its predecessors in interest onto its own claim for adverse possession – all the way back to approximately 1930. It also argues that Jemsco has a claim of right based on its reasonable belief at its time of purchase, that the Strip was its property, notwithstanding the fact that it was not listed on its deed. Jemsco further argues that N47 did not reference or address the Extension Wall at the north of the Strip and the cinder-block wall at the south of the Strip, which enclosed the Strip.

It is here that the issues regarding the differences between the pre- and post-2008 adverse possession laws crystalize with respect to this case. Based, in part, on this issue, the court allowed N47 to present a sur-reply to address Jemsco’s reply (NYSCEF Doc. No 40).

In its sur-reply, N47 reiterates most of its prior arguments and argues that Jemsco has not sufficiently established its right to tack the prior owner’s alleged adverse possession of the Strip

to its own. It also argues, for the first time, that the Extension Wall and cinder-block walls were non-structural, relying on the sur-reply affidavit of its engineering expert, Mr. Patterson.

### ***Statutory Application***

Given the foregoing, a threshold issue for the court is to determine which standard of adverse possession is applicable to the instant action. To do so, the court must assess whether Jemsco may tack its predecessor's purported adverse possession of the Strip to its own claim.

A party seeking adverse possession is entitled to “tack any period of adverse possession enjoyed by their predecessor in title onto its own period of adverse possession” (*Pritsiolas v Apple Bankcorp, Inc.*, 120 AD3d 647, 650 [2d Dept 2014]). However, “in order for tacking to be applicable, a party must show that the party's predecessor ‘intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed’” (*Diaz v Mai Jin Yang*, 148 AD3d 672, 674 [2d Dept 2017] quoting *Brand v Prince*, 35 NY2d 634, 637 [1974]).

Here, Jemsco fails to provide the court with any evidence that the prior owner of the Jemsco Property, in fact, intended to, or actually did, convey any portion of the Strip to Jemsco when it transferred to Jemsco its deed for the Jemsco Property. Accordingly, Jemsco has not established entitlement to tack any prior alleged adverse possession of the Strip enjoyed by its predecessors to its own 10-year time period for adverse possession.

It is noted that Jemsco's managing member, Jack Elo, stated that he “reasonably believed” Jemsco had obtained the right to possess the Strip because the Extension Wall was “original construction” purportedly erected at some point in the 1930's (Elo aff, ¶ 12). This statement alone, however, is insufficient to establish whether Jemsco's predecessor in interest intended to turn over the Strip to Jemsco.

That said, at least some the Objects' physical encroachments into the Strip give rise to a colorable claim that the Strip may have been adversely possessed by a prior owner. Therefore, based on the record before the court at this time, questions of fact remain as to whether Jemsco is entitled to tack its claim.<sup>4</sup> In light of the foregoing, at this time, N47 is also not entitled to a determination that the 2008 statutory changes to the RPAPL, in fact, apply herein, such that the court could issue a declaration of rights under that framework.

Further, even were the court to consider Jemsco's claim under the Pre-2008 analysis, the outstanding issues regarding the nature of Jemsco's predecessors' intrusion into the Strip underscore the premature nature of Jemsco's motion. These issues directly impact whether Jemsco has or may assert proper claim of right to the Strip (*see e.g. Oak Ponds, LLC v Willumsen*, 295 AD2d 587, 588 [2d Dept 2002] ["Awareness that others own the property upon entry on the property or within the 10-year statutory period will defeat any claim of right"]; *Joseph v Whitcombe*, 279 AD2d 122, 127 [1st Dept 2001] [indicating that the "*ab initio*" entry onto the property must be made under a claim of right]; *All the Way E. Fourth St. Block Assn. v. Ryan-NENA Community Health Ctr.*, 30 AD3d 182, 182 [1st Dept 2006] [internal quotation marks and citation omitted] ["occupancy for an extended period of years coupled with open conduct consistent with ownership, but absent an initial claim of right may not ripen into ownership by adverse possession"]).

Accordingly, at this time, even were the court to allow Jemsco to tack and consider Jemsco's adverse possession claim under the pre-2008 analysis, the evidence presented is insufficient to award Jemsco judgment in its favor.

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<sup>4</sup> The court notes that the procedural posture of this case is pre-discovery, pre-note of issue.

Thus, Jemsco is not entitled to summary judgment in its favor on its claim for adverse possession.

### **N47's Cross Motion to Dismiss the Adverse Possession Claim**

Notwithstanding the questions of fact surrounding which adverse possession law applies to the present claims before the court, N47 argues that, under both the pre- and post-2008 adverse possession frameworks, the result would be a finding that there was no adverse possession of the Strip. Therefore, the court will now analyze the alleged encroachments under both frameworks.

#### ***The Extension Wall and the Cinder Block Protrusions***

##### **Applying the Pre-2008 Standard**

In its cross-motion, N47 never explicitly addresses the Extension Wall or the cinderblock protrusions, aside from a broad conclusory claim that Jemsco has no “ownership, adverse or otherwise, or other interest in the Strip” (cross-motion, at 16). Essentially, it argues, without further explanation, that the Extension Wall and the cinderblock protrusions (whether viewed alone or in concert with the other alleged encroachments) cannot be a “substantial enclosure” such that a claim of right could be found (*Estate of Becker v Murtagh*, 19 NY3d 75, 81 [2012]). Such unsupported and conclusory statements are insufficient to establish entitlement to summary judgment (*see e.g. Emigrant Mtge. Co., Inc. v Karpinski*, 76 AD3d 1044, 1047 [2d Dept 2010] [“the bald, conclusory statement in the supporting affirmations of [the movant’s] counsel . . . was insufficient to establish [the movant’s] prima facie entitlement to judgment as a matter of law”]).

Accordingly, N47 has not established entitlement to summary judgment dismissing that part of Jemsco’s adverse possession claim predicated on the existence of the Extension Wall or the cinderblock protrusions under the pre-2008 standard.

Applying the Post 2008 Standard

According to N47's engineering expert, the Extension Wall – the brick wall extending from the Jemsco Building and across the Strip's northern end – and the cinderblock protrusions on the southern side of the Strip are non-structural walls (Patterson sur-reply aff., ¶ 9 (opining that “brick fillers . . . are not structural walls nor [do they] comprise any part of the structural component of Jemsco's Building”). In further support, Patterson states that the Jemsco Building's eastern wall is terra cotta and that such walls “are supported vertically, and not laterally” (*id.*, ¶ 23). Patterson then opines that any protrusion into the Strip from the Extension Wall and the cinderblock protrusions cannot be weight bearing or structural. Therefore, N47 argues the Extension Wall and the cinderblock protrusions should be deemed a permissive occupation of N47's property (RPAPL § 543 [“The existence of de minimum non-structural encroachments including . . . non-structural walls, shall be deemed to be permissive and non-adverse”]).

That said, N47 did not present testimony or evidence supporting this position until its sur-reply, despite having the opportunity to assert this argument in its cross-motion (which, it is noted, explicitly addresses the 2008 amendments to the RPAPL and argues for a determination based thereon). “[A] party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply, and generally, evidence submitted for the first time in reply papers should be disregarded by the court” (*Nationstar Mtge., LLC v Tamargo*, 177 AD3d 750, 753 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v Osias*, 156 AD3d 942, 943-944 [2d Dept 2017]). Accordingly, the court will not consider this evidence provided for the first time in the reply papers.



Therefore, based on the evidence provided by N47 in its cross motion, N47 has not established, as a matter of law, that the Extension Wall or the cinderblock protrusions were non-structural, such that their existence would “be deemed to be permissive and non-adverse” (RPAPL § 543). Accordingly, N47 is not entitled to summary judgment dismissing the adverse possession claim predicated on the existence of the Extension Wall or the cinderblock protrusions under the 2008 amendment to the RPAPL at this time.

### ***The Aerial Encroachments***

Generally, an owner of real property possesses the right to utilize all of its air space (*Macmillan, Inc. v CF Lex Assoc.*, 56 NY2d 386, 392 [1982] [“Air rights are incident to the ownership of the surface property – the right of one who owns land to utilize the space above it”).

N47 argues that three alleged aerial encroachments – the wooden spars and iron grates affixed to the sixth floor of the Jemsco Building that hung over the Strip; a concrete window ledge extending approximately six inches into the Strip down the length of the Jemsco Property, and air conditioners jutting out from the Strip-facing windows of the Jemsco Property (collectively the Aerial Elements) – cannot, as a matter of law, establish adverse possession over any of N47’s property.

In opposition, Jemsco argues that the existence of the Aerial Elements over N47’s property is sufficient to establish adverse possession over the property below. Jemsco relies on a combination of cases to establish this point. First, it argues that adverse possession may be established where the possession was “a type that would give the owner a cause of action in ejectment against the occupier” (*Brand v Prince*, 35 NY2d 634, 636 [1974]; *Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996]). Jemsco then cites to *Butler v Frontier Tel. Co.*,

186 NY 486 (1906) for the proposition that an aerial encroachment may be subject to an action of ejectment. Therefore, Jemsco reasons, any open and notorious and hostile aerial encroachment over a property gives rise to an action in ejectment and lays the groundwork to assert a claim for adverse possession of the property occupied by the aerial encroachment.

This argument is unpersuasive.

In *Butler*, the aerial encroachment consisted of a wire “strung about thirty feet from the surface of the ground on the easterly side and slanting to about twenty feet on the westerly side, [that] reached across the entire width” of the adjoining premises (*id.* at 487). The Court of Appeals, in 1906, determined that such an encroachment warranted an order of ejectment.

That said, where the encroachment does not extend across the entire width of a property, such as where “a portion of a building being erected on one’s own land and projecting over the adjoining land of a neighbor . . . it does not give rise to a cause of action for ejectment” (*Pennbus Realities, LLC v H Eighth Ave. Assoc. LLC*, 29 Misc 3d 1224(A), 2010 NY Slip Op 51991 (U), \*3 [Sup Ct, NY County 2010] [Shulman, J.]; quoting 81 NY Jur 2d, Nuisances § 29 [“where one erects a building upon the line of his or her own premises so that the eaves or gutters project over the lands of neighbors, an action for a nuisance is the appropriate remedy”]).

Here, as in *Pennbus*, the Aerial Elements do not reach across the entire width of N47’s property. Rather, they encroach only 5 inches to 22 inches over N47’s Property, beginning approximately at the sixth floor of the Jemsco Building. Accordingly, the Aerial Elements are mere nuisances that do not give rise to an action for ejectment, and they cannot form the basis for an adverse possession claim in this matter.

Further, it is noted that air conditioners that overhang into adjacent property have been held to not be in conflict with an owner’s interests such that they would constitute adverse

possession of the land beneath the air conditioners (*1380 Madison Ave., L.L.C. v 17 E. Owners Corp.*, 2003 NY Slip Op 51309(U) \*3 [Sup Ct, NY County, 2003], *affd*, 12 AD3d 156 [1st Dept 2004] [denying the application of adverse possession because the intruding air conditioners “never conflicted with [the owner’s] interests”]).

Accordingly, implementing either the pre- or post-2008 adverse possession scheme, N47 is entitled to summary judgment dismissing that part of Jemsco’s adverse possession claim predicated on the occupation of the Strip by the Aerial Elements.<sup>5</sup>

### ***The Alleged Foundation Wall***

Jemsco argues that the Jemsco Building includes an above ground foundation wall that juts out approximately nine inches into the Strip (the Foundation Wall). In support of this position, it relies on O’Buckley’s review of the 1946 Survey, which included a notation that the 1930 survey indicated that the Foundation Wall was located nine inches “east of reference line” – i.e. within the Strip, and that a portion of the Foundation Wall was above ground (O’Buckley affidavit, exhibit B; NYSCEF Doc. No. 16). It also relies on a photograph that purports to depict the subject Foundation Wall adjacent to the Jemsco Building.

In support of its cross motion, N47 argues that the 1946 survey is speculative and that its own recent survey reveals no such foundation wall. Further, it argues, the any foundation for the Jemsco Building would be underground and, therefore, would not be open and obvious. It also

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<sup>5</sup> The court notes that, in its sur-reply, N47 raises for the first time that the cinderblock protrusions and/or the Extension Wall did not actually reach the ground and should, therefore, be considered as nothing more than aerial overhangs akin to air conditioners (*see* Peterson sur-reply aff., ¶ 9 [the “brick filler did not run from the ground, but rather started from the 2d floor . . . [with the] bricks cantilever[ed] out over the airspace of N47’s Property”]). As this argument is presented for the first time in reply to its cross motion, the court will not consider this evidence (*Nationstar Mtge.*, 177 AD3d at 753).

argues that the photograph does not depict a foundation wall. Rather, it depicts the remnants of a separate foundation wall that supported a separate, no longer existent, building (Jones affidavit, ¶ 16; NYSCEF Doc. No. 25).

In opposition to N47's cross motion, Jemsco argues that photographic evidence shows the existence of a foundation wall above ground. It further argues that N47 prevented O'Buckley from inspecting the subject Foundation Wall and, therefore, prevented him from ascertaining whether the Foundation Wall, in fact, is attached to and/or supports the Jemsco Building.

Finally, N47 argues, in its sur-reply, that the Jemsco Building is built in such a manner that it would not need lateral foundation support such as the Foundation Wall and, therefore, the Foundation Wall does not provide structural support to the Jemsco Building.

Here, there are disputes as to (1) what is depicted in the photograph, (2) whether the Foundation Wall exists, (3) whether the Foundation Wall provides support to the Jemsco Building, (4) whether the Foundation Wall was a part of the N47 Building, and even (5) whether the Foundation Wall is above ground such that it could be considered open and notorious. These disputes forestall any resolution of these issues on summary judgment under the pre-2008 analysis (questions regarding, *inter alia*, the open and notorious, actual and hostile elements). They also forestall any resolution under the post-2008 analysis (questions regarding whether the Foundation Wall provided structural support to the Jemsco Building).

The record before the court consists of conflicting statements from experts and conflicting interpretation of documents and photographs. Resolution of such disputes are properly left for a jury's determination (*see e.g. Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013] [quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]

[“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge”]).

Finally, to the extent that N47 argues that Jemsco’s failure to establish its right to adverse possession requires this court to grant summary judgment in N47’s favor, such argument is unpersuasive. “[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent’s proof” (*Fromme v Lamour*, 292 AD2d 417, 417 [2d Dept 2002] [internal quotation marks and citation omitted]).

### **The Prescriptive Easement Claims**

Jemsco argues that it should be awarded summary judgment in its favor on its claim for prescriptive easement over the Strip, based on its alleged use of the Strip arising from the existence of the Objects thereon. N47 argues that no such easement exists or has been established.

“An easement by prescription is generally demonstrated by proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period” (*Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 27 [1st Dept 2011] [internal quotation marks and citations omitted]). These elements must be established by clear and convincing evidence (*Amalgamated Dwellings, Inc. v Hillman Hous. Corp.*, 33 AD3d 364, 364 [1st Dept 2006]). The elements for adverse possession and prescriptive easement run parallel in many ways, and the questions of fact at issue with the adverse possession claims create identical issues with respect to the prescriptive easement claim.

Thus, neither Jemsco nor N47 are entitled to summary judgment with respect to the prescriptive easement claim.

### **The Trespass Claims**

N47 cross moves to dismiss Jemsco's trespass claim against it. The trespass claim, as pleaded, seeks damages for N47's allegedly intentional entry into the Strip "[o]n various dates in 2020" for "construction activities" (complaint, ¶ 28).

"The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission" (*Marone v Kally*, 109 AD3d 880, 882 [2d Dept 2013] [internal quotation marks and citations omitted]).

Even assuming *arguendo* that Jemsco is awarded possession of the Strip, its trespass claim must be dismissed. By Order dated December 23, 2020, the court granted N47 permission to access the Jemsco Property with respect to planned demolition in 2020 (Rothstein Aff, exhibit 1; NYSCEF Doc. No. 24). This Order directly relates to the trespass actions alleged in the complaint and permits N47 to access Jemsco's property. Accordingly, even if the Strip is found to be Jemsco's property, it cannot be said that N47 entered onto it without permission.

Thus, N47 is entitled to summary judgment dismissing the trespass claim.

The remaining arguments of the parties have been reviewed and are unavailing.

### **CONCLUSION**

For the foregoing reasons, it is hereby

ORDERED that the motion of respondent/plaintiff Jemsco Realty LLC (Jemsco) (motion sequence number 001 of Index No. 190819/2020), pursuant to CPLR 3212, for summary judgment on its claims of adverse possession and prescriptive easement as against petitioner/defendant N47 Associates, LLC (N47) is denied with leave to replead; and it is further

ORDERED that N47's cross motion for summary judgment dismissing the adverse possession, prescriptive easement and trespass claims against it is granted, as limited above, to the extent that the trespass claim and those adverse possession claims predicated on


encroachments of the Aerial Elements over the air space of the Strip are dismissed; and the cross motion is otherwise denied with leave to replead; and it is further

ORDERED that the adverse possession claims raised by Jemsco in opposition to the Special Proceeding (Index No. 159215/2020) are decided in accordance with the findings in this Decision and Order; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Jemsco shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days; and it is further

ORDERED that the parties shall appear for a Microsoft Teams Conference on January 13, 2021 at 10:00am.

  
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11/19/2021  
DATE

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CAROL EDMEAD, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE	
		<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER